No. 74-1262

In the Supreme Court of the United States

OCTOBER TERM, 1974

DANIEL CHIARITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that evidence introduced against him was inadmissible because it was the product of an unreasonable search of his clothing by a customs official at the customs inspection area of an airport.

Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of importing cocaine and of possession of cocaine for distribution, in violation of 21 U.S.C. 841(a)(1) and 952(a). He was sentenced to concurrent terms of four years' imprisonment and special parole terms for three years, on each count. The court of appeals affirmed *per curiam* (Pet. App. A 1-5).

1. On April 3, 1974, while enroute from Colombia, South America, to Chicago, Illinois, petitioner entered the customs inspection area at Miami International Airport. After successfully passing through the baggage checkpoint, but before he left the customs inspection area, petitioner was stopped by Customs Patrol Officer Gilbert Payette and was escorted to an inspection room (Tr. 25-26, 32-41).

Officer Payette, who had three years' experience in the customs service, testified that he was suspicious of petitioner because petitioner was walking by himself, not speaking with anyone, appeared nervous, his vest seemed bulky, and he was wearing a three-piece suit although it was warm during April in Miami and Colombia (Tr. 10-11, 25-29, 31). Payette's suspicion was increased by the origin of his flight, Colombia, where there is extensive trafficking in narcotics (Tr. 42-43).

While in the inspection room, petitioner emptied his pockets pursuant to Payette's request, but nothing suspicious was revealed (Tr. 45-46). Payette then conducted a patdown search of petitioner, which revealed a small amount of cocaine wrapped in a dollar bill inside petitioner's vest pocket (Tr. 47-49, 51-53, 55). Thereupon petitioner was advised of his rights and a strip search was conducted (Tr. 53-56). Apparently this search revealed nothing incriminating; but after petitioner was advised that his shoes would be x-rayed, he admitted that cocaine was concealed in his shoes. Cocaine was discovered in the heels and soles of the shoes petitioner was wearing and in other shoes in petitioner's luggage (Tr. 56-59).

2. Petitioner contends that the patdown search violated the Fourth Amendment. While strip searches and body cavity searches conducted by customs officials at the bor-

der may require articulable, objective facts creating a real suspicion of illegal conduct, patdown searches may be based on mere subjective suspicion. See *United States* v. *Flores*, 477 F.2d 608, 609 (C.A. 1), certiorari denied, 414 U.S. 841; cf. *Shorter* v. *United States*, 469 F.2d 61, 63 (C.A. 9), certiorari denied, 411 U.S. 918. Since Payette's initial search was limited to a patdown of petitioner's clothing, that search was reasonable though justified by mere suspicion. Once the patdown revealed cocaine, the strip search was also reasonable (Tr. 47-49, 51-56). See *United States* v. *Forbicetta*, 484 F.2d 645 (C.A. 5), certiorari denied, 416 U.S. 993. Petitioner argues (Pet. 13) that the decision below in exempting patdown border searches from the standard of more than mere suspicion required for strip searches by some courts of appeals creates a new and improper category of border searches. But patdown border searches, unlike strip searches, have consistently been allowed on mere suspicion. See *United States* v. *Flores, supra*; *Shorter* v. *United States, supra*.

In arguing that mere suspicion was insufficient to justify his patdown search, petitioner relies on *United States* v. *Price*, 472 F.2d 573 (C.A. 9), *Shorter* v. *United States, supra*, and *United States* v. *Johnson*, 425 F.2d 630 (C.A. 9), certiorari dismissed, 404 U.S. 802. But *Price* and *Johnson* concerned the reasonableness of strip searches, and the opinions do not indicate that patdowns are subject to the same test. In *Shorter*, the court stated that the search involved only the person's coat, which he was not wearing. Since that was not a strip search, the court held that the search could be justified on mere suspicion. *Shorter* v. *United States, supra*, 469 F.2d at 63-64. The decision of the court below is thus correct and is not in conflict with the decisions of any other court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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